TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 491.

WESTERN UNION TELEGRAPH COMPANY, PETITIONER,

vs.

ESTEVE BROTHERS AND COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED AUGUST 27, 1930.

CERTIORARI AND RETURN FILED NOVEMBER 6, 1930.

(27,948)

(27,848)

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a UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, Begun on the Third Monday in November, A. D. 1919, at New Orleans, Louisiana, Before the Honorable Richard W. Walker, Circuit Judge, and the Honorable Rhydon M. Call and the Honorable J. C. Hutcheson, Jr., District Judges.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,

versus

ESTEVE BROTHERS & COMPANY, Defendant in Error.

Be it remembered, That heretofore, to-wit, on the 1st day of March, A. D. 1920, a transcript of the record in the above styled cause, pursuant to a writ of error to the District Court of the United States for the Eastern District of Louisiana, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 3506, as follows, to-wit:

b TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3506.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,

versus

ESTEVE BROTHERS & COMPANY, Defendant in Error.

Error to the District Court of the United States for the Eastern District of Louisiana.

[Original Record Filed March 1, 1920.]

U. S. Circuit Court of Appeals. Filed Mar. 11, 1920. Frank H. Mortimer, Clerk.

1 UNITED STATES OF AMERICA:

District Court of the United States, Eastern District of Louisiana.

No. 15830.

ESTEVE BROTHERS & COMPANY, Plaintiff, Defendant in Error.

versus

WESTERN UNION TELEGRAPH COMPANY, Defendant, Plaintiff in Error.

Messrs. Spencer, Fenner, Gidiere & Phelps, for Western Union Telegraph Company, defendant, plaintiff in error.

Messrs. Hall, Monroe & Lemann, for Esteve Brothers & Company, plaintiff, defendant in error.

Writ of Error to the United States District Court for the Eastern District of Louisiana, New Orleans Division, from the United States Circuit Court of Appeals for the Fifth Circuit, Returnable Within Thirty (30) Days from the Nineteenth (19th) Day of February, A. D. 1920, at the City of New Orleans, State of Louisiana.

Petition.

2

Filed March 27th, 1918.

STATE OF LOUISIANA,
Parish of Orleans,
City of New Orleans:

Civil District Court for the Parish of Orleans.

Petition and Affidavit.

Filed February 16th, 1918.

Civil District Court for the Parish of Orleans, State of Louisiana.
Division "C."

No. 122,972. Docket 4.

ESTEVE BROTHERS & COMPANY

versus

WESTERN UNION TELEGRAPH COMPANY.

Petition.

To the Honorable the Judge of the Civil District Court in and for the Parish of Orleans, State of Louisiana:

The Petition of Esteve Brothers & Company, a commercial partnership composed of Jose M. Esteve, Angel; Ramon Esteve, Luis Esteve

(all residents of Barcelona, Spain,) and F. Janvier Esteve, a resident of Savannah, Georgia, the said partnership having offices in New Orleans, Louisiana, and Savannah, Georgia, herein appearing through all of said members, with respect represents:

I.

That on the 13th day of September, 1917, Jose M. Esteve, being the agent and representative of said firm in Barcelona, Spain,
3 deposited in the Central Office of the Telegraph Administration at Barcelona, for transmission to your petitioner at New Orleans, Louisiana, a cable reading as follows, to-wit:

"Esteve Brothers,
New Orleans:

Sell two hundred bales futures naming equivalent New Orleans, October price.
(Signed) ESTEVE."

II.

That the said cable was duly accepted for transmission to your petitioner at New Orleans, Louisiana, and was by the Central Office of the Telegraph Administration at Barcelona entrusted and delivered to and accepted by the defendant Western Union Telegraph Company (a corporation doing business in this Parish and State), which thereby undertook and agreed to deliver the same to your petitioner at New Orleans.

III.

That the said Western Union Telegraph Company, instead of delivering the said cable as received by it or as sent from Barcelona, as it had agreed and undertaken to do, utterly failed to do so, but, on the contrary, transmitted and delivered it with such gross and inexcusable carelessness and negligence as to deliver it reading as follows:

"Esteve Brothers,
New Orleans:

Sell two thousand bales futures naming equivalent New Orleans, October price.
(Signed) ESTEVE."

4 IV.

That as indicated by the foregoing, the Western Union Telegraph Company delivered the said cable so as to make it read "two thousand" bales instead of two hundred bales.

V.

That the said cable, as originally sent, was not written in any code but in plain English, and that the number of bales was not stated in figures but written out in letters, and that the cable bore on its face full notice of its importance — of the loss which would naturally be caused by an error in the figures.

VI.

That upon receipt of the cable as delivered to it by the Western Union Telegraph Company directing the sale of "two thousand" bales of futures, your petitioner caused two thousand bales of January futures to be sold, and notified Jose M. Esteve at Barcelona by cable as follows:

Sept. 15th/17.

"Jose Esteve,
Barcelona:

Sold two thousand bales January, New Orleans nineteen fifty, October price nineteen sixty-two.
(Signed) ESTEVE."

the meaning of said cable being that your petitioner had sold two thousand bales of cotton for future delivery at the price of 19.50 cents per pound, equivalent to 19.62 cents per pound for October delivery.

5 VII.

That your petitioner's cable of September 15th, 1917, sent through the defendant Western Union Telegraph Company, was evidently delayed in transmission, or the answer thereto was delayed, and on September 25th, 1917, your petitioner received the following cable from Barcelona:—

"Barcelona, 22.

Esteve Brothers,
New Orleans:

Your confirmation sale two thousand bales January nineteen fifty wrong. Order was two hundred bales instead two thousand bales reported. Confirm correction.
(Signed) ESTEVE."

VIII.

Immediately upon receipt of this cable of correction, your petitioner, in order to make the correction, repurchased eighteen hundred bales of cotton for future delivery in January, out of the two thousand which it had theretofore sold, so as to make the net sale two hundred bales, to conform to the original cable as originally sent.

IX.

That in the interval, the cotton future market had gone up, so that your petitioner's purchases were made at 23.01 cents per pound, as compared with the selling price of 19.50 cents per pound, resulting in an error of $31,590, to which must be added $135 for commissions, making a total of $31,725, which amount has been actually paid out in cash and lost by your petitioner as a result of the error above described.

6 X.

Your petitioner has been for many years in the cotton exporting business in New Orleans and Savannah, with a representative at Barcelona, and has had extensive business relations and dealings with the defendant Western Union Telegraph Company; and said Western Union Telegraph Company was well aware, through said dealings, as well as generally aware as a member of the business community, of the character and nature of petitioner's business, and the character and nature of the original cable sent to your petitioner, and of the damages which would naturally ensue from an error in the transmission and delivery thereof.

XI.

That the Western Union Telegraph Company is responsible to your petitioner for the heavy loss and damage occasioned to your petitioner by the grossly erroneous and negligent transmission and delivery of the message above described.

Wherefore, the premises considered, petitioner prays that said Western Union Telegraph Company be served with a copy hereof, through its proper agent, and be cited to appear and answer hereto, and that after due proceedings had, there be judgment in favor of your petitioner and against the said Western Union Telegraph Company, in the full sum of Thirty-One Thousand Seven Hundred and Twenty-five ($31,725) Dollars, with legal interest from this date, and all costs. And your petitioner further prays for general and equitable relief and for such further orders as the nature of the case may require or law or equity make proper.

(Signed) HALL, MONROE & LEMANN,
Attorneys for Petitioner.

7 STATE OF LOUISIANA,
Parish of Orleans:

Yvon L. Duquesnay, being duly sworn says that he is the Manager of the New Orleans Office of Esteve Brothers & Company, the petitioner above named, and duly authorized to made this affidavit,

and that all of the facts and allegations above stated are true and correct.

(Signed) PER PRO ESTEVE BROS. & CO.
YVON L. DUQUESNAY.

Sworn to and subscribed before me, at New Orleans, La., on this 15th day of February, 1918.

(Signed) WATTS K. LEVERICH,
Notary Public.

Petition, Affidavit, and Order of Removal.

Filed March 27, 1918.

Civil District Court for the Parish of Orleans, State of Louisiana. Division "C."

No. 122,972, Docket 4.

ESTEVE BROTHERS

vs.

WESTERN UNION TELEGRAPH COMPANY.

Petition, Affidavit, Order, and Bond of Removal to U. S. District Court.

Filed February 28th, 1918.

The petition of Western Union Telegraph Company, defendant in the above numbered and entitled cause, respectively shows:

8 I.

That the above suit was begun against this defendant in the Civil District Court for the Parish of Orleans and State of Louisiana, on or about the eighteenth day of February, 1918.

II.

That at the time said suit was begun and at the present time, the defendant was, and still is, a corporation chartered by and existing under and by virtue of the laws of the State of New York, and having its chief office and place of business in the City of New York, and is not a citizen nor a resident of the State of Louisiana.

III.

That the plaintiff is a commercial co-partnership, composed of Jose M. Esteve, Angel Ramon Esteve, Luis Estive and F. Javier

Esteve; that none of the aforesaid members of said firm are citizens of either the State of New York or the State of Louisiana, or residents thereof, and that all of said members of said firm are aliens, being subjects of the King of Spain.

IV.

That the matter in controversy in this cause exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

V.

Your petitioner further avers that the time has not yet elapsed wherein your petitioner is required, under the practice and laws of the State of Louisiana, and under the rules of this Honorable Court, to answer or plead to the petition filed by the plaintiff in this cause.

VI.

That by reason of the premises this petitioner, defendant in the above entitled and numbered cause, desires and is entitled to have said suit removed from the Civil District Court for the Parish of Orleans, State of Louisiana, into the United States District Court for the Eastern District of Louisiana, New Orleans Division, which is the District Court to be held in the district where this suit is pending.

VII.

Petitioner shows that a written notice of this petition and the accompanying bond for removal was given Esteve Brothers, plaintiff herein, prior to the filing of this petition and bond.

VIII.

Your petitioner presents and files herewith a good and sufficient bond, as provided by the Statutes of the United States, in such cases, that it will within thirty days from the date of the filing of this petition, enter in the United States District Court for the Eastern District of Louisiana, New Orleans Division, a certified copy of the record in this suit, and for the payment of all costs that may be awarded by said District Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays that this Court proceed no further herein, except to make the order of removal as required by law and to accept the bond presented herewith, and to direct a transcript of

the record herein to be made for the United States District
10 Court for the Eastern District of Louisiana, New Orleans Division, as provided by law.

WESTERN UNION TELEGRAPH COMPANY,
(Signed) By HOWE, FENNER, SPENCER & COCKE,
Its Attorneys.

STATE OF LOUISIANA,
Parish of Orleans:

Before me, the undersigned authority, personally came and appeared, W. A. Porteous, who being duly sworn, deposes and says:

That he is the General Agent for the State of Louisiana, for the Western Union Telegraph Company, and is the superior officer of said company in said state, and is duly authorized to make this affidavit; that he has read the foregoing petition and that all of the allegations therein contained are true and correct.

(Signed) WM. A. PORTEOUS.

Sworn to and subscribed before me, this 27th day of February, 1918.

(Signed) PIERRE D. OLIVIER,
[SEAL.] *Notary Public.*

Civil District Court for the Parish of Orleans, State of Louisiana, Division "C."

No. 122,972, Docket —.

ESTEVE BROTHERS

vs.

WESTERN UNION TELEGRAPH COMPANY.

This cause coming on for hearing upon the application of defendant herein for an order transferring this cause to the United
11 States District Court for the Eastern District of Louisiana, New Orleans Division, and it appearing to the Court that the defendant has filed its petition for removal in due form of law, and that the defendant has filed its bond with good and sufficient surety, as provided by law, and has given due notice to plaintiff of same, and it appearing to the Court that this is a proper cause for removal to said District Court,

Now, therefore, it is hereby ordered and adjudged that this cause be and it is hereby removed to the United States District Court for the Eastern District of Louisiana, New Orleans Division, and the Clerk is hereby directed to make up the record in said cause for transmission to said Court forthwith.

Done and signed in open Court, this 28th day of February, 1918.
(Signed) E. K. SKINNER,
Judge.

Answer to Plaintiff's Petition.

Filed June 12, 1918.

In the United States District Court for the Eastern District of Louisiana, New Orleans Division.

No. —.

ESTEVE BROTHERS & COMPANY

vs.

WESTERN UNION TELEGRAPH COMPANY.

Now into Court through its undersigned counsel comes Western Union Telegraph Company, made defendant herein, and for answer to the petition of Esteve Brothers & Company says:

12 I.

Defendant admits the allegations contained in the first paragraph of plaintiff's petition

II.

Answering the allegations contained in the second paragraph of plaintiff's petition, defendant avers that said cable was duly transmitted by the Central Office of the Telegraph Administration at Barcelona, Spain, to Paris, France, and thence was transmitted by the system of telegraphs owned and operated by the French Government to Havre, France and was there delivered to defendant for transmission by it to New Orleans, Louisiana. Same as hereinabove set forth, defendant denies all and singular the allegations contained in the second paragraph of plaintiff's petition.

III.

Answering the allegations contained in the third paragraph of plaintiff's petition, defendant says that it admits that in the course of transmission over its lines the said message through error was altered so as to read:

"Esteve Brothers,
New Orleans:

Sell two thousand bales futures naming equivalent New Orleans price.
(Signed) ESTEVE."

And that said message as thus altered was delivered to Esteve Brothers at New Orleans. Save as hereinabove admitted defendant denies all and singular the allegations contained in the third paragraph.

13 IV.

Answering the allegations contained in the fourth paragraph, defendant says that it admits that the cable as delivered at New Orleans read two thousand bales instead of two hundred bales, but avers that the error in changing the words "two hundred" to "two thousand" occurred in the course of transmission between New York and New Orleans.

V.

Answering the allegations contained in the fifth paragraph, defendant says that it is not possessed of sufficient information to justify a reasonable belief in regard thereto, and therefore, on information and belief, denies all and singular the allegations therein contained.

VI.

Answering the allegations contained in the sixth paragraph, defendant says that it admits that on September 15th, 1917, plaintiff sent the cable set forth in said paragraph. Defendant is not possessed of sufficient information to justify a reasonable belief as to the other allegations contained in the said paragraph, and, therefore, on information and belief, denies all and singular the other allegations therein contained.

VII.

Answering the allegations contained in the seventh paragraph, defendant says that it admits that on September 26th, 1917, petitioner received the cable from Barcelona set forth therein. Defendant is not possessed of sufficient information to justify a reasonable belief as to the other allegations contained in said
14 paragraph, and, therefore, on information and belief, denies all and singular the other allegations therein contained.

Further answering the allegations contained in said paragraph, defendant avers on information and belief, that said cable of September 15th, 1917, set forth in paragraph VI. of plaintiff's petition, was delivered to plaintiff at Barcelona in ample time for it to have advised its agency at New Orleans, long prior to September 26th, 1917, that the confirmation sale of two thousand bales was wrong and should have been two hundred bales, and defendant avers that it was incumbent upon petitioner, immediately upon being advised of said error, to have advised its New Orleans office thereof and that defendant can not in any event be held liable for any damages

sustained by plaintiff, if any were sustained, which is denied, which could have been prevented by plaintiff, immediately upon receipt of the cable of September 15th, 1917, advising its New Orleans office of the error in said sale.

VIII.

Answering the allegations contained in the eighth paragraph of plaintiff's petition, defendant says that it is not possessed of sufficient information to justify a reasonable belief in regard to the allegations therein contained, and, therefore, on information and belief, denies all and singular the allegations therein contained.

IX.

Answering the allegations contained in the ninth paragraph of plaintiff's petition defendant says that it is not possessed of sufficient information to justify a reasonable belief as to the truth of the allegations therein contained, and therefore, on information and belief, denies all and singular the allegations therein contained, and specially denies that petitioners sustained any loss as a result of the error in the transmission of said message of September 13th, 1917.

X.

Answering the allegations contained in the tenth paragraph of plaintiff's petition, defendant says that it denies all and singular the allegations therein contained.

XI.

Answering the allegations contained in the eleventh paragraph of plaintiff's petition, defendant says that it denies all and singular the allegations therein contained.

XII.

Further answering, defendant avers that the contract for the transmission of said cable of September 13th, 1917, from Barcelona, Spain, to New Orleans, Louisiana, was made in Barcelona, Spain, between plaintiff and the Central Office Telegraph Administration at Barcelona, Spain, which is a Department of the Government of Spain, and that the contract made by defendant for the transmission of said cable from Havre, France, to New Orleans, Louisiana, was made in Havre, France, and that defendant in transmitting said cable from Havre, France to New Orleans, Louisiana, was, under the law of Spain, acting as a public agent of the Government of Spain, and was, under the law of France, acting as a public agent of the Government of France, having been employed by each of said Governments as its agent to perform a governmental function, and that

under the law of Spain, the Spanish Government, and all agencies employed by it in transmitting cablegrams entrusted to said
16 Government, or its governmental agencies for transmission, and under the law of France, the French Government and all agencies employed by it in transmitting cablegrams entrusted to said Government, or its Governmental agencies for transmission, are exempt from liability for any loss occasioned through errors in the transmission or delivery of cablegrams, whether occurring through negligence or not, and that defendant is, therefore, not responsible for any loss that plaintiff may have sustained by the error in the transmission of said cablegram of September 13th, 1917.

XIII.

Further answering, defendant avers that even if there were any liability on its part to plaintiff for the error in the transmission of the said cable, which is denied, then said liability could not in any event exceed the proportion of the through tolls paid by plaintiff for the transmission of said cablegram from Barcelona, Spain to New Orleans, Louisiana, accruing to it, which amounted to $4.65, for the following reasons, to wit:

(*a*) That it was a term and condition of the contract, subject to which and subject to which only such message was delivered by plaintiff to the Central Office of the Telegraph Administration at Barcelona, Spain, and subject to which and subject to which only such message was accepted by the Central Office of the Telegraph Administration at Barcelona, Spain, and was also a term and condition of the contract, subject to which and subject to which only such message was delivered by the French Government to the defendant at Havre, France, and subject to which and subject to which only such message was accepted by the defendant at Havre, France; that the defendant should not be liable for mistakes or delays in the transmission or delivery or for non-delivery of
17 any unrepeated message, beyond the amount received for sending the same; and that the said message was an unrepeated message, and neither the Central Office of the Telegraph Administration at Barcelona, Spain, nor the French Government nor defendant was directed or requested to repeat the same and all that defendant received in exchange for its obligation in respect to the said message, was the sum of Four and 65/100 Dollars ($4.65), which was defendant's ordinary and reasonable charge for the transmission of such a message without repetition, from Havre, France, to New Orleans, Louisiana, including its delivery at destination.

(*b*) That such message was a foreign and an interstate message, to be sent from a point in France to a point in the State of Louisiana in the United States, through a number of the States of the United States, and was as such interstate and foreign commerce.

(*c*) That by defendant's established rules, regulations and tariffs, as the same were in effect prior to June 18th, 1910, and are still

maintained and established, messages are classified among other classifications, into "repeated" and "unrepeated", a repeated message, as the name implies, being a message which the defendant agrees that the office of destination shall transmit back, after receiving it, to the point of origin, in order to avoid mistakes, etc., that in any case of unrepeated messages defendant assumes no liability (except for gross negligence) beyond the amount received for sending the same, while in the case of repeated messages, defendant does not undertake to limit its liability, to the amount received for sending them, but assumes, on the contrary, liability for not to exceed fifty times the amount received for sending the message (except insofar as such liability may be further limited by other provisions of the contract); and that
18 for the additional work of repeating a message and the additional risk of liability assumed in the case of a repeated message, the defendant at all the times mentioned, made and still makes an additional charge equal to one-half of the unrepeated message rate.

(d) That by the Act of Congress approved June 18th, 1910, the Congress of the United States entered and assumed charge of regulating the field of interstate and foreign communication by telegraph, and thereby removed and exempted such interstate and foreign communication by telegraph from the field of state regulation or interference and undertook to, and did confer upon the Interstate Commerce Commission full power over the rates, charges, facilities, classifications and practices of the telegraph companies engaged in interstate and foreign commerce, with reference to such interstate and foreign commerce, and particularly conferred on the Interstate Commerce Commission power to approve, alter or acquiesce in existing rates and classifications, which power the Interstate Commerce Commission has ever since retained and still retains.

(e) That the said Interstate Commerce Commission, prior to the filing of the message sued on and prior to the commencement of this action, had full knowledge of the rates, charges and classifications established by the defendant as above described, and, with such knowledge, acquiesced in and approved the same, and did not at any time alter or seek to alter such rates, charges, classifications or regulations, and thereby recognize the right of the defendant to charge a higher rate for a greater liability and lower rate for a less liability, as above described.

By reason of which and of all the premises, the defendant says that
19 the stipulation in the contract subject to which this message, if any, was accepted, to the effect that the defendant's liability should not, in any event, exceed the sum of Four and 65/100 Dollars ($4.65), was reasonable and valid and binding on the plaintiff herein, and free from any regulation or control on the part of the State of Louisiana, or any other State, so that the defendant ought not to be liable, in any event, in this action beyond the sum of Four and 65/100 Dollars ($4.65), with interest from the sixteenth day of February, 1918.

Wherefore, defendant prays that after due proceedings had, there be judgment in its favor and against petitioner dismissing its suit at its cost.

And for all general and equitable relief.

(Signed) HOWE, FENNER, SPENCER & COCKE,
Attorneys for Defendant.

STATE OF LOUISIANA,
Parish of Orleans:

Before me, the undersigned authority, personally came and appeared, Esmond Phelps, who being by me first duly sworn, declared

That he is a member of the law firm of Howe, Fenner, Spencer & Cocke; that said firm are the attorneys for the Western Union Telegraph Company, defendant in the above entitled and numbered cause, that he has read the foregoing answer and that all of the allegations and denials of fact therein contained are true and correct to the best of his knowledge, information and belief.

(Signed) ESMOND PHELPS.

Sworn to and subscribed before me, this 12 day of June, 1918.

[SEAL.] (Signed) PIERRE D. OLIVIER,
Notary Public.

20 *Note of Evidence.*

Filed Feb. 19, 1920.

United States District Court, Eastern District of Louisiana.

No. 15830.

ESTEVE BROTHERS

vs.

WESTERN UNION TELEGRAPH CO.

Proceedings Had in the Above Entitled and Numbered Cause in Open Court Before the Honorable Rufus E. Foster, Judge, United States District Court, Eastern District of Louisiana, on the 12th Day of February, 1920.

Appearances:

M. M. Lemann, Esq., for the Plaintiff.
Esmond Phelps, Esq., for the Defendant.

Offer.

Mr. Lemann, counsel for plaintiff offered in evidence, subject to the objections to be immediately stated, the agreed statement of facts between counsel for plaintiff and defendant.

Objection.

Mr. Lemann: We object to the offer of evidence contained in said stipulation regarding the filing of tariffs, schedules and forms of the Interstate Commerce Commission, on the ground that the same are immaterial, irrelevant and incompetent.

The Court: I overrule the objection.

21 Mr. Lemann: To which ruling of the Court I except and reserve a bill.

Objection.

Mr. Lemann: We object to the offers contained in said stipulation as to division of rate between the Western Union Telegraph Company and the other lines over which this message passed, on the ground that the same is immaterial, irrelevant and incompetent.

The Court: I overrule the objection.

Mr. Lemann: To which ruling I except and reserve a bill.

Mr. Phelps: We join in the offer, except as to paragraph 7 of said stipulation concerning the question of damage that was sustained by the plaintiff, and we object to paragraph 7 on the ground that the facts therein stated are irrelevant and immaterial, inasmuch as to hold defendant liable in this case beyond the amount of the liability provided for in its established classifications and tariffs filed with the Interstate Commerce Commission, to-wit the amount of the portion of the tolls accruing to the defendant, or the sum of $4.65, with interest from the date of the message would be in contravention of Article 1, Section 8, subdivision 3 of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations, and of the acts of Congress passed in pursuance thereof, especially the act of Congress approval June 18, 1910.

The Court: I overrule the objection.

22 Mr. Phelps: I except and reserve a bill to the ruling of the Court.

Offer.

Mr. Phelps: I specially offer the documents referred to in said stipulation and marked Exhibits A, B, C and D, same being respectively abstract from the minutes of the Western Union Telegraph Company, Executive Committee meeting of May 2nd, 1916, the form of cable of the Western Union Telegraph Company, and the tariff book of the Western Union Telegraph Company, which will be identified by the signature of counsel.

Objection.

Mr. Lemann: I object to the offer on the ground that the same is immaterial, irrelevant and incompentent.

The Court: I overrule the objection.

Mr. Lemann: To which ruling I except and reserve a bill.

Offer.

Mr. Lemann: I will offer the report of the Interstate Commerce Commission for the year 1911, being the Twenty-fifth Annual Report, particularly pages 5 and 6 thereof.

Mr. Lemann: I now move that your Honor direct a verdict for the plaintiff for the amount set out in the Statement here, which is slightly different from the amount in the petition, $31,095.00.

23 Mr. Phelps: I move the Court to direct a verdict in favor of the plaintiff in the sum of $4.65, with interest at 5% from September 13, 1917, basing said amount on the following grounds, that to hold defendant liable in this case beyond the amount of the liability provided for in its established classifications and tariffs filed with the Interstate Commerce Commission, to wit, the amount of the portion of the tolls accruing to the defendant, or the sum of $4.65, with interest from the date of the message, would be in contravention of Article 1, Section 8, Subdivision 3, of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations, and of the acts of Congress passed in pursuance thereof, especially the act of Congress approved June 18, 1910.

The Court: I will deny the motion of the defendant and grant the motion of the plaintiff.

Mr. Phelps: I except and reserve a bill to the ruling of the Court, and ask to have the stipulation, together with all the documents annexed thereto made part of this bill.

Mr. Phelps: Counsel for defendant requests, in view of the fact that the present term will be at an end within the next three or four days, that the Court shall grant a period of sixty days within which to prepare bills of exception petition and assignment of errors in connection with the appeal.

The Court: I will allow you sixty days within which to prepare your bill of exceptions petition and assignment of errors.

24 *Charge of the Court.*

GENTLEMEN:

You may be interested in this case, and I will tell you what it is. The only question in the case, gentlemen, is as to whether or not the tariffs and forms limit the liability of the telegraph company on an unrepeated message to the amount paid for sending the message, whether these tariffs and forms being filed with the Interstate Commerce Commission are binding on the plaintiff in this case. The

message was originally sent from Barcelona, in Spain, and the form stipulated in the tariffs and on file with the Interstate Commerce Commission was not used, and my ruling is that the sender was not bound by these forms and tariffs on file with the Interstate Commerce Commission in the United States, that, therefore, the plaintiff can recover his actual damages, the case arising out of the missending of a cable regarding the sale of cotton futures.

Stipulation of Facts.

Filed Feb. 12, 1920.

In the United States District Court for the Eastern District of Louisiana.

ESTEVE BROS.

vs.

WESTERN UNION TELEGRAPH COMPANY.

Stipulation of Facts.

I.

It is admitted that on September 13th, 1917, the plaintiff deposited in the central office of the Telegraph Administration, which is owned and operated by the Spanish Government at Barcelona, Spain, for transmission to New Orleans, Louisiana, a message reading as follows:

"Esteve Bros.,
New Orleans:

Sell two hundred bales futures naming equivalent New Orleans October price.
(Signed) ESTEVE."

II.

It is admitted that the said message was correctly transmitted by the Central Office of the Telegraph Administration at Barcelona, Spain, to Paris, France, and was correctly transmitted by the system of telegraphs owned and operated by the French Government from Paris, France, to Havre, France, and was there delivered to the defendant's cable system, over which it was transmitted correctly to New York City, where it was turned over to the defendant's land line system for transmission between New York City and New Orleans, La. for delivery at New Orleans.

III.

It is admitted that this message was properly transmitted by the defendant over its cable system from Havre, France, to New York City, N. Y., and was turned over reading correctly to the defendant's land line system at New York City, for transmission to and delivery at New Orleans, Louisiana, and that an error occurred in the transmission thereof between New York City, and New Orleans, Louisiana, whereby the word "hundred" was changed to "thousand"; and that the message was delivered by the defendant to the plaintiff's office in the City of New Orleans, Louisiana, reading:

"Esteve Bros.,
New Orleans.

Sell two thousand bales futures naming equivalent New Orleans October price.
(Signed) ESTEVE."

26 IV.

It is admitted that the document attached hereto and made part hereof, marked Exhibit "A", signed by counsel for identification, is a true and correct copy of a resolution adopted by the Executive Committee of the defendant on May 2d, 1916, the said Executive Committee being a Committee of the Board of Directors of the defendant, with full powers to act for and on behalf of the entire Board in such matters; that in the month of May, 1916, defendant acting under the authority of this resolution filed with the Interstate Commerce Commission, its classification of land line and cable messages and filing forms of such messages together with the conditions under which the various classes of land line and cable messages are handled and its tariffs and schedules, and that all of the said documents and forms have been since May 2d, 1916, and still are, on file with the Interstate Commerce Commission, and no changes therein have been made. Copies of the said documents so filed with the Interstate Commerce Commission are hereto annexed and made a part hereof, and marked "Exhibits" B, C," etc.

It is further admitted that there is no rule or regulation adopted by the Interstate Commerce Commission requiring the filing of any tariffs, schedules, blanks, or forms of telegraph or cable companies.

It is further admitted that none of the defendant's aforesaid forms or blanks were used at any time in the receiving or transmission of the aforesaid message.

It is further admitted that plaintiffs have their main office in Barcelona and would testify that they had no actual information as to the resolution of the defendant or the filing of any forms, blanks, tariffs or schedules with the Interstate Commerce Commission.

27

V.

It is admitted that some time prior to June 18, 1910, and up to and including the month of September 1917, the rate charged for a non-repeated message between Barcelona, Spain and New Orleans, Louisiana, was forty-four (44c.) cents per word, which charge was made up of six (6c.) cents per word over defendant's land line system between New York City and New Orleans, Louisiana, and twenty-five (25c.) cents per word over its cable system between New York City and Havre, France, and thirteen (13c.) cents per word over the following lines, thirteen (13c.) cents being the rate exacted by and paid to the French and Spanish Government telegraph system for the handling of messages over their lines between Barcelona, Spain, and Havre, France, this rate not being a joint rate but the sum of the local rates of each of the three connecting systems over which the message passed.

It is also admitted that all cablegrams turned over to defendant's land line system by its cable system are handled as land line messages, except that the charge therefor is based upon the number of words in the body of the message, and also on the address and signature; whereas, in the case of ordinary land line messages, the charge is based solely on the number of words in the body of the message.

VI.

It is admitted that the amount paid by the plaintiff to the Spanish Telegraph Administration at Barcelona, Spain, for the transmission of the message from Barcelona, Spain, to New Orleans, Louisiana, in the manner heretofore described was Six Dollars and Sixty Cents ($6.60), of which the defendant subsequently received Four Dollars and Sixty-five cents ($4.65) for transmitting the message from Havre, France, to New Orleans, Louisiana, of which Three
28 Dollars and Seventy-five Cents ($3.75) was apportioned in accordance with the tariff to the transmission from Havre to New York and Ninety Cents ($0.90) to transmission from New York to New Orleans, and that the amount so received is the amount specified in its Tariff Book on file with the Interstate Commerce Commission, and is the amount specified in the said tariff for the transmission without repetition of a message containing the number of words contained in the message sued on, and its delivery at New Orleans, Louisiana.

It is further admitted that the plaintiff made no request to have the message in question repeated, and that had the plaintiff requested the repetition of the said message, it would have been required to pay an additional rate. It is further admitted that it is not usual to ask that messages be repeated.

VII.

It is further admitted that immediately upon receipt of the cable of September 13, 1917, plaintiff's New Orleans office sold two thou-

sand (2,000) bales of futures at 19.57 cents per pound, and immediately on September 15, 1917, advised plaintiff's Barcelona office by cable sent over defendant's lines that it had done so. It is further admitted that immediately upon receipt of the cable of September 15, 1917, plaintiff's Barcelona office advised the New Orleans office by cable sent over defendant's lines that the order was for two hundred (200) instead of two thousand (2,000) bales, and that immediately upon receipt of this cable of correction, plaintiff's New Orleans office repurchased eighteen hundred (1,800) bales of cotton for future delivery in January at 23.01c. per pound, as compared with the selling price of 19.57c. per pound, resulting in a loss of
Thirty Thousand, Nine Hundred Sixty Dollars ($30,-
29 960.00), together with commissions of One Hundred and
Thirty-five and no/100 dollars ($135.00), making a total of Thirty-one Thousand, and Ninety-five and no/100 ($31,095.00) Dollars, which amount has been actually paid out in cash and lost by plaintiff as the result of the error in the transmission of the cable of September 13, 1917.

VIII.

It is hereby stipulated and agreed between Messrs. Hall, Monroe & Lemann, Attorneys for the plaintiff, Esteve Brothers, and Messrs. Spencer, Fenner, Gidiere & Phelps, Attorneys for the defendant, Western Union Telegraph Company, that the facts hereinbefore stated shall be taken as true, and shall have the same force and effect as though established by competent testimony, provided, however, that either party shall have the right to raise the question of the admissibility of any or of all of the facts herein set forth in this suit, and to urge any and all legal objections thereto.

The right is reserved to either party to adduce evidence not inconsistent with any of the facts hereinbefore stated, but neither party shall have the right to adduce evidence inconsistent therewith.

(Signed) HALL, MONROE & LEMANN,
Attorneys for Esteve Brothers.

(Signed) SPENCER, FENNER, GIDIERE & PHELPS,
Attorneys for Western Union Telegraph Company.

30 EXHIBIT "A."

Filed Feb. 12, 1920.

Extract of Minutes of the Western Union Telegraph Company, Meeting Executive Committee, May 2nd, 1916.

The President reported that he is advised by Counsel that the Interstate Commerce Commission has granted permission to the Telegraph Company to file its tariff book with the Commission for information; also its regulations respecting the transmission of mes-

sages, and its forms of message blanks showing the conditions attaching to the different classes of messages. The President also stated that Counsel has advised that the Executive Committee approve the filing of such documents, and the regulation and classification of messages as so filed.

Whereupon, it was

Resolved, that the classification of messages, the forms and the rules and regulations respecting the transmission of messages as indicated in the tariff book of the company and the conditions and stipulations as shown upon the message forms, be and the same are hereby approved by this Committee, and that the President be authorized to file the same with the Interstate Commerce Commission.

A true copy from the Minutes.

(Signed) ANDREW T. BURLEIGH,
[SEAL.] *Secretary.*

Esteve v. Western Union, Exhibit A. S. F. G. & P., Attys. for Deft. H. M. & L., Attys. for Pltff.

31 EXHIBIT B.

Filed February 12, 1920.

United States District Court, Eastern District of Louisiana.

No. 15830.

ESTEVE BROTHERS & COMPANY

vs.

WESTERN UNION TELEGRAPH COMPANY.

Western Union Telegram.

Class of service desired. Fast Day Message. —. Day Letter. —. Night Message. —. Night Letter. —.

Newcomb Carlton, President. George W. E. Atkins, first Vice-President.

Patrons should mark an X opposite the class of service desired; Otherwise the Telegram will be transmitted as a fast day Message.

Form 1206.

Receiver's No. —. Check —. Time Filed —.

Send the following telegram, subject to the terms on back hereof, which are hereby agreed to.

All Telegrams taken by this Company are subject to the following terms:

To guard against mistakes or delays, the sender of a telegram should order it repeated, that is telegraphed back to the originating office for comparison. For this, one-half the unrepeated telegram

rate is charged in addition, unless otherwise indicated on its face, this is an unrepeated telegram and paid for as such, in consideration whereof it is agreed between the sender of the telegram and this Company as follows:

32 1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated telegram, beyond the amount received for sending the same, nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any Repeated telegram, beyond fifty times the sum received for sending the same, unless specially valued; nor in any case for delays arising from unavoidable interruption in the workings of its lines; nor for errors in cipher or obscure telegrams.

2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of Fifty Dollars, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof.

3. The Company is hereby made the agent of the sender, without liability, to forward this telegram over the lines of any other Company when necessary to reach its destination.

4. Telegrams will be delivered free within one-half mile of the Company's office in towns of 5,000 population or less, and within one mile of such office in other cities or towns. Beyond these limits the Company does not undertake to make delivery, but will, without liability, at the sender's request, as his agent and at his expense, endeavor to contract for him for such delivery at a reasonable price.

33 5. No responsibility attaches to this Company concerning telegrams until the same are accepted at one of its transmitting offices; and if a telegram is sent to such office by one of the Company's messengers, he acts for that purpose as the agent of the sender.

6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission.

7. Special terms governing the transmission of messages under the classes of messages enumerated below shall apply to messages in each of such respective classes in addition to all the following terms.

8. No employee of the Company is authorized to vary the foregoing.

THE WESTERN UNION TELEGRAPH COMPANY, INCORPORATED,
NEWCOMB CARLTON,
President.

Classes of Service.

Fast Day Messages.

A full-rate expedited service.

Night Messages.

Accepted up to 2.00 A. M. at reduced rates to be sent during the night and delivered not earlier than the morning of the ensuing business day.

Day Letters.

A deferred day service at rates lower than the standard day message rates as follows: One and one-half times the standard Night Letter rate for the transmission of 50 words or less and one-
34 fifth of the initial rate for each additional 10 words or less.

Special Terms Applying to Day Letters.

In further consideration of the reduced rate for this special "Day Letter" service, the following special terms in addition to those enumerated above are hereby agreed to:

A. Day Letters may be forwarded by the Telegraph Company as a deferred service and the transmission and delivery of such Day Letters is, in all respects, subordinate to the priority of transmission and delivery of regular telegrams.

B. Day Letters shall be written in plain English. Code language is not permissible.

C. This Day Letter may be delivered by the Telegraph Company by telephoning the same to the addressee and such delivery shall be a complete discharge of the obligation of the Telegraph Company to deliver.

D. This Day Letter is received subject to the express understanding and agreement that the Company does not undertake that a Day Letter shall be delivered on the day of its date absolutely and at all events; but that the Company's obligation in this respect is subject to the condition that there shall remain sufficient time for the transmission and delivery of such Day Letter on the day of its date during regular office hours, subject to the priority of the transmission of regular telegrams under the conditions named above.

No employee of the Company is authorized to vary the foregoing.

35 Night Letters.

Accepted up to 2.00 A. M. for delivery on the morning of the ensuing business day, at rates still lower than standard night message rates, as follows: The standard day rate for 10 words shall be charged for the transmission of 50 words or less, and one-fifth of such standard day rate for 10 words shall be charged for each additional 10 words or less.

Special Terms Applying to Night Letters.

In further consideration of the reduced rate for this special "Night Letter" service, the following special terms in addition to those enumerated above are hereby agreed to:

A. Night Letters may at the option of the Telegraph Company be mailed at destination to the addressees, and the Company shall be deemed to have discharged its obligation in such cases with respect to delivery by mailing such Night Letters at destination, postage prepaid.

B. Night Letters shall be written in plain English. Code language is not permissible.

No employee of the Company is authorized to vary the foregoing

36 EXHIBIT "C."

United States District Court, Eastern District of Louisiana.

No. 15830.

ESTEVE BROTHERS & COMPANY

vs.

WESTERN UNION TELEGRAPH COMPANY.

Western Union Cablegram.

Newcomb Carlton, President, George W. E. Atkins, First Vice-President.

Class of Service Desired: Full Rate. —. Half Rate Deferred. —. Cable Letter. —. Week End Letter. —.

Patrons should mark an X opposite the class of service desired: Otherwise the Cablegram will Be Transmitted at full rates.

Form 2903.

Number —. Time Filed, —. Number of Words, —.

Send the following Cablegram, subject to the terms on back hereof, which are hereby agreed to.

All Messages taken by this Company are subject to the following terms:

To guard against mistakes or delays the sender of a cable message should order it repeated, that is, telegraphed back to the originating office for comparison. For this, one-quarter the unrepeated cable message rate is charged in addition. Unless otherwise indicated on its face this is an unrepeated cable message and paid for as such.

37 This Company will not assume any responsibility concerning any message beyond the terminus of its own lines. It is agreed between the sender of the following message and this Company, that this Company shall not be liable for mistakes or delays in transmission or delivery, nor for non-delivery to the next connecting telegraph company, or to the addressee, of any unrepeated message, beyond the amount of that portion of the tolls which shall accrue to this Company; and that this Company shall not be liable for mistakes in the transmission or delivery, nor for delay or non-delivery to the next connecting telegraph Company, of any repeated message, beyond fifty times the extra sum received by this Company from the sender for repeating such message over its own lines; and that this Company shall not be liable in any case for delays arising from interruption in the working of its lines, nor for errors in cipher or obscure messages. And this Company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other Company when necessary to reach its destination.

It is agreed that this Company shall not be liable for damages in any case where the claim is not presented to it in writing within sixty days after the message is filed with this Company for transmission.

No employee of the Company is authorized to vary the foregoing.

THE WESTERN UNION TELEGRAPH
COMPANY, INCORPORATED.
NEWCOMB CARLTON,
President.

Classes of Service.

Full Rate.

An expedited service throughout. Code language permitted.

38 Deferred Half Rate.

Half rate messages are subject to being deferred in favor of full rate messages for not exceeding 24 hours. Must be in language of country of origin or of destination, or in French. This class of service is in effect with most European countries and with various other countries throughout the world. Full particulars supplied on application at any Western Union Office.

Cable Letters.

For plain-language communications. The language of the country of destination may be employed, if the cable letter service is in operation to that country. Subject to delivery at the convenience of the company within 24 hours if telegraphic delivery is selected. Delivery by mail beyond London will be made if the prefix C.L.P. is written before the address. Rate between New York, Boston, Halifax or Montreal and London or Liverpool, 75c. for 13 words including necessary prefix and 5c. for each additional word. Rates from interior points slightly higher.

Week End Letters.

Similar to Cable Letters except that rate between New York and the other places mentioned is $1.15 for 25 words including the necessary prefix. Excess words 5c. each. Must be filed before midnight Saturday for delivery Monday morning, if telegraphic delivery is selected.

39 *Hearing and Verdict.*

Extract from the Minutes.

November Term, 1919.

New Orleans,
Thursday, February 12th, 1920.

Court met pursuant to adjournment.
Present: Hon. Rufus E. Foster, Judge.

No. 15830.

ESTEVE BROTHERS & CO.

vs.

WESTERN UNION TELEGRAPH COMPANY.

This cause was this day called for trial.

Present:

Monte M. Lemann, of counsel for plaintiff.
Esmond Phelps, of counsel for defendant.

Whereupon, the following named jurors were called and sworn to well and truly try the issue joined herein, to wit:

1. D. Britton North, 2. Leon Irwin, 3. Arthur O'Connor, 4. Daniel L. Ryan, 5. Frank V. Moise, 6. Albert Godchaux, 7. Thos.

I. Galbreth, 8. Geo. B. Friedrichs, 9. Leonce Bergeron, 10. Emanuel Engel, 11. Jos. J. Levins, 12. Gaston Lanaux,

and the trial was proceeded with;

After hearing the pleadings and evidence offered on behalf of the respective parties, counsel for plaintiff moved the Court to direct the jury to find a verdict in favor of the plaintiff upon the grounds urged, and counsel for defendant also moved the Court for instructions upon the grounds urged, and after hearing arguments of counsel for the respective parties on said motions to direct verdicts, and on due consideration thereof, the Court granted the motion of plaintiff and directed the jury to find a verdict in favor of the plaintiff, and refused defendant's motion to direct; counsel for defendant reserving bills of exception to the rulings of the Court granting the motion of plaintiff to direct a verdict in their favor and also to the refusal of the Court to grant defendant's instructions;

Thereupon, after hearing the instructions of the Court, and under said instructions, the jury did then and there, in open Court, in presence of counsel for the respective parties, through their foreman, Daniel L. Ryan, render and deliver the following verdict, to wit:

New Orleans, February 12, 1920.

We, the Jury, find a verdict in favor of the Plaintiff and against the Defendant, the Western Union Telegraph Co., for the sum of Thirty-one thousand and Ninety-five dollars ($31,095.00) with legal interest from Feby. 16, 1918.

DANIEL L. RYAN,
Foreman.

Whereupon, on motion of counsel for the plaintiff, it was ordered by the Court that the said verdict be recorded, and it is done accordingly; and it was further ordered that the said jury be discharged from further consideration of the cause.

41 *Judgment.*

Extract from the Judgment Book.

November Term, 1919.

New Orleans,
Thursday, February 12th, 1920.

Court met pursuant to adjournment.
Present: Hon. Rufus E. Foster, Judge.

No. 15830.

ESTEVE BROTHERS & COMPANY
vs.
WESTERN UNION TELEGRAPH COMPANY.

By reason of the verdict of the jury herein rendered, and in accordance therewith;

It is ordered, adjudged and decreed that the plaintiff, Esteve Brothers & Company, do have and recover of and from the defendant, Western Union Telegraph Company, the full sum of thirty-one thousand and ninety-five and 00/100 ($31,095.00) dollars, with legal interest thereon from February 16th, 1918, until paid, together with all costs of suit.

Judgment rendered February 12, 1920.
Judgment signed February 14, 1920.

(Signed) RUFUS E. FOSTER,
Judge.

42 *Order Allowing Defendant 60 Days to Prepare and Present Bills of Exceptions.*

Extract from the Minutes.

November Term, 1919.

New Orleans,
Thursday, February 12th, 1920.

Court met pursuant to adjournment.
Present: Hon. Rufus E. Foster, Judge.

No. 15830.

ESTEVE BROTHERS & CO.
vs.
WESTERN UNION TELEGRAPH COMPANY.

On motion of Esmond Phelps, of counsel for defendant herein
It was ordered by the Court that the said defendant be allowed

sixty (60) days from this date as time in which to prepare and present its bills of exceptions taken in this cause.

43 *Petition for Writ of Error and Order.*

Filed Feb. 19, 1920.

In the United States District Court for the Eastern District of Louisiana, New Orleans Division.

No. 15830.

ESTEVE BROS.

vs.

WESTERN UNION TELEGRAPH COMPANY.

Western Union Telegraph Company, defendant in the above entitled cause, feeling itself aggrieved by the verdict of the jury, and the judgment entered on 12th day of February, 1920, comes now by Spencer, Fenner, Gidiere & Phelps, its attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the honorable, the United States Circuit Court of Appeals for the Fifth Circuit, under, and according to the laws of the United States in this behalf made and provided, and also that an order be made, fixing the amount of security which defendant shall give and furnish upon said writ of error, and that, upon the g'ving of such security, all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Fifth Circuit.

And your petitioner will ever pray.

(Signed) SPENCER, FENNER, GIDIERE & PHELPS,
Attorneys for Defendant.

44 *Order.*

Upon motion of Spencer, Fenner, Gidiere & Phelps, attorneys for defendant, and upon filing a petition for a writ of error, and assignment of errors,

It is ordered that a writ of error be, and it is, hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Fifth Circuit the judgment heretofore entered herein, and that the amount of said bond on said writ of error be, and hereby is, fixed at Forty-thousand ($40,000) Dollars, the same to act as a supersedeas bond.

(Signed) RUFUS E. FOSTER,
Judge.

Assignment of Errors.

Filed Feb. 19, 1920.

In the United States District Court for the Eastern District of Louisiana, New Orleans Division.

No. 15830.

ESTEVE BROS.

vs.

WESTERN UNION TELEGRAPH COMPANY.

Comes now Western Union Telegraph Company, defendant in the above entitled and numbered cause, and in connection with its petition for a writ of error in this cause assigns the following errors which plaintiff in error avers occurred on the trial thereof, and upon which it relies to reverse the judgment entered herein as appears of record:

45 (1) That the Court erred in overruling the objection of defendant as to the admissibility of the facts stated in paragraph 7 of the stipulation of facts relative to the damages sustained by plaintiff, for the reason that said facts were irrelevant and immaterial inasmuch as the liability of defendant was limited to the portion of the tolls accruing to it for the transmission of the message sued upon, or the sum of $4.65, for the reason that said message was an unrepeated message and paid for as such, and that the tariffs, rules and regulations, and forms of messages of defendant on file with and approved by the Interstate Commerce Commission at the time of the sending of the message in question provided that in the case of unrepeated messages, the liability should be limited to the portion of the tolls received by defendant; and therefore, to hold defendant liable in this case beyond said amount contravenes Article I, Section 8, Subdivision 3, of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations, and of the acts of Congress passed in pursuance thereof, especially the act of Congress approved June 18, 1910.

(2) The Court erred in granting the motion to *retain* a verdict in favor of plaintiff in this cause for $31,095.00, for the reason that the liability of defendant was limited to the portion of the tolls accruing to it for the transmission of the message sued upon, or the sum of $4.65, for the reason that said message was an unrepeated message and paid for as such, and that the tariffs, rules, and regulations, and forms of messages of defendant on file with and approved by the Interstate Commerce Commission at the time of the sending of the message in question provided that in the case of unrepeated messages, the liability should be limited to the portion of the tolls

received by defendant; and therefore, to hold defendant
46 liable in this case beyond said amount contravenes Article 1, Section 8, Subdivision 3, of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations, and of the acts of Congress passed in pursuance thereof, especially the act of Congress approved June 18, 1910.

(3) The Court erred in overruling the motion of the defendant that the Court direct a verdict in favor of plaintiff in the sum of $4.65 with interest at the rate of five per cent, (5%) from September 13, 1917, for the reason that the liability of defendant was limited to the portion of the tolls accruing to it for the transmission of the message sued upon, or the sum of $4.65 for the reason that said message was an unrepeated message and paid for as such, and that the tariffs, rules and regulations, and forms of messages of defendant on file with an approved by the Interstate Commerce Commission at the time of the sending of the message in question provided that in the case of unrepeated messages, the liability should be limited to the portion of the tolls received by defendant; and therefore, to hold defendant liable in this case beyond said amount contravenes Article 1, Section 8, Subdivision 3, of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations, and of the acts of Congress passed in pursuance thereof, especially the act of Congress approved June 18, 1910.

Wherefore, Plaintiff in error prays that the judgment of said Court be reversed, etc.

(Signed) SPENCER, FENNER, GIDIERE & PHELPS,
Attorneys for Defendant in Error.

47 *Bill of Exceptions.*

Filed Feb. 19, 1920.

In the United States District Court for the Eastern District of Louisiana, New Orleans Division.

No. 15830.

ESTEVE BROS.

vs.

WESTERN UNION TELEGRAPH COMPANY.

This was an action at law to recover the sum of Thirty-one thousand, Seven hundred twenty-five ($31,725) Dollars damages alleged to have been caused by an error in the transmission of a cablegram sent from Barcelona, Spain, by plaintiffs addressed to themselves at New Orleans, Louisiana.

The case came regularly on for trial on the 12th day of February, 1920, before Honorable Rufus E. Foster, district judge, M. M. Lemann, Esq., appearing as counsel for plaintiff, and Esmond Phelps, Esq., appearing as counsel for defendants.

A jury having been impaneled, the following proceedings were had:

Counsel for plaintiff offered in evidence an agreed statement of facts signed by counsel for the respective parties, which was as follows:

Agreed statement of facts omitted from the printed record, being *hereto* copied at page 24.

* * * * * * *

48 Exhibit "A" referred to in said statement was a copy of the resolution adopted by the Executive Committee of the defendant, authorizing and directing the filing of its tariffs and schedules with the Interstate Commerce Commission.

Exhibit "B" was the form of cablegram in use by defendant and filed by it with the Interstate Commerce Commission, and this form contained the following stipulation:

"To guard against mistakes or delays, the sender of a cable message should order it repeated, that is, telegraphed back to the originating office for comparison. For this, one-quarter the unrepeated cable message rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeated cable message and paid for as such. It is agreed between the sender of the following message and this Company, that this Company shall not be liable for mistakes or delays in transmission or delivery of any unrepeated message beyond the amount of that portion of the tolls which shall accrue to this Company."

Exhibit "C" referred to in said stipulation was the regulation form of land line message in use by defendant, and on file with said Interstate Commerce Commission, and which contained the following provisions:

"To guard against mistakes or delays, the sender of a message should order it repeated, that is, telegraphed back to the originating office for comparison. For this, one half the unrepeated message rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeated message and paid for as such, in consideration whereof it is agreed between the sender of the message and this Company as follows: The Company shall not be liable for
49 mistakes or delays in the transmission or delivery of any unrepeated message beyond the amount received for sending the same."

Exhibit "D" referred to in said stipulation was the Tariff Book containing the rates applicable for the transmission of cables and telegrams between various points in the United States and foreign countries including the transmission of cables between Barcelona Spain, and New Orleans, Louisiana, and the transmission of tele

grams between New York, N. Y., and New Orleans, Louisiana, and also, the rules and regulations of said Company. The rates specified in said Tariff Book were for the transmission of unrepeated messages, and it was provided therein that, in case a message was ordered repeated, an extra charge therefor should be made.

Upon the offering of said stipulation by counsel for plaintiff, counsel for defendant objected to the offering of paragraph 7 thereof on the ground "that the facts therein stated are irrelevant, and immaterial, inasmuch as to hold defendant liable in this case beyond the amount of the liability provided for in its established classifications and tariffs filed with the Interstate Commerce Commission, to wit, the amount of the portion of the tolls accruing to the defendant, or the sum of $1.65, with interest from the date of the message, would be in contravention of Article 1, Section 8, Subdivision 3, of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations, and of the acts of Congress passed in pursuance thereof, especially the act of Congress approved June 18, 1910."

The Court overruled this objection, and counsel for defendant then and there duly excepted to said ruling of the Court and hereby tender this their bill of exceptions to the Court to sign and seal, and the Court does hereby sign and seal the same.

50 Thereafter counsel for plaintiff moved the Court to direct a verdict for plaintiff in the sum of Thirty-one thousand and nine-five ($31,095) Dollars, and counsel for defendant at the same time moved the Court to direct in favor of plaintiff in the sum of $1.65, with interest at five per cent. (5%) from September 13, 1917, on the following grounds,

"That to hold defendant liable in this case beyond the amount of the liability provided for in its established classifications and tariffs filed with the Interstate Commerce Commission, to wit, the amount of the portion of the tolls accruing to the defendant, or the sum of $1.65, with interest from the date of the message, would be in contravention of Article 1, Section 8, Subdivision 3, of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations, and of the acts of Congress passed in pursuance thereof, especially the act of Congress approved June 19, 1910."

The Court thereupon denied the motion of defendant and granted the motion of plaintiff, and counsel for defendant then and there duly excepted to the ruling of the Court, and hereby tender this their bill of exceptions to the Court to sign and seal, and the Court does hereby sign and seal the same.

The jury then brought in a verdict in favor of plaintiff for damages in the sum of Thirty-one thousand and ninety-five ($31,095) Dollars.

And now, in furtherance of justice and that right may be done, the defendant presents the foregoing as its bill of exceptions in this

case, and prays that the same may be settled and allowed, and signed and certified by the Judge, as provided by law.

(Signed) SPENCER, FENNER, GIDIERE & PHELPS,
Attorneys for Defendant.

51 Settled and allowed, this 19 day of February, 1920.

(Signed) RUFUS E. FOSTER,
Judge.

Appeal Bond.

Filed February 19, 1920.

In the United States District Court for the Eastern District of Louisiana, New Orleans Division.

No. 15830.

ESTEVE BROS.

vs.

WESTERN UNION TELEGRAPH COMPANY.

Know all men by these presents that we, Western Union Telegraph Company, and American Surety Company of New York as surety, are held and firmly bound unto Esteve Bros. in the full and just sum of Forty thousand ($40,000) Dollars, to be paid to the said Esteve Bros., their attorneys, successors, administrators, executors, or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents.

Signed and dated this 19th day of February, 1920.

Whereas lately at a regular term of the District Court of the United States for the Eastern District of Louisiana, sitting at New Orleans, in said district, in a suit pending in said Court between Esteve Bros. as plaintiff and Western Union Telegraph Company as defendant, No. 15830, on the law docket of said Court, final judgment was rendered against the said Western Union Telegraph Company for the sum of Thirty-one thousand and ninety-five

52 ($31,095) Dollars, with interest at the rate of five per cent. (5%) and the said Western Union Telegraph Company has obtained a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment of the said Court in the aforesaid suit, and a citation directed to the said Esteve Bros. defendant in error, citing them to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit to be holden at New Orleans in the State of Louisiana, according to law within thirty (30) days from the date hereof.

Now the condition of the above obligation is such that if the said Western Union Telegraph Company shall prosecute its writ of error

to effect and answer all damages and costs if it fails to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

WESTERN UNION TELEGRAPH CO.,
(Signed) By SPENCER, FENNER, GIDIERE & PHELPS, *Its Attys.*
AMERICAN SURETY COMPANY OF NEW YORK,
(Signed) By CHAS. HOFFMANN,
Resident Vice-President.

Attest.
(Signed) C. MURPHY,
Resident Assistant Secretary.

Approved this the 19 day of February, 1920.
(Signed) RUFUS E. FOSTER, *Judge.*

53 *Praecipe for Transcript.*

Filed Feb. 19, 1920.

Spencer, Fenner, & Phelps,
Counsellors at Law,
United Fruit Company Building,
708 Union Street,

New Orleans, February 18, 1920.

Walker B. Spencer, Charles Payne Fenner, Philip S. Gidiere, Esmond Phelps, Charles E. Dunbar, Jr.

Henry J. Carter, Esq., Clerk,
United States District Court,
City:

DEAR SIR:

In making up the transcript in connection with the writ of error taken in the case of Esteve Bros., vs. Western Union Telegraph Company, No. 15830, United States District Court for the Eastern District of Louisiana, please include therein the following:

(1). The petition, the petition for removal and the order of removal.

(2). The answer of defendant.

(3). The agreed statement of facts, and the exhibits A, B, and C offered in connection therewith, same being, respectively, the certified copy of the resolutions of the executive committee of defendant; the form of cable message; and the form of land line message.

54 (4). The proceedings had upon the trial of the cause, as embodied in the notes of the stenographer, together with the verdict of the jury and the judgment rendered thereon.

(5). The petition for writ of error; the assignments of error; the bill of exceptions, and the orders rendered in connection therewith; and the appeal bond.

(6). We do not desire exhibit D, which is the Tariff Book of defendant, included in the transcript; as same will, by agreement of counsel, be sent up in the original.

We desire exhibits B and C both included in the transcript of appeal, and, also, sent up in the original.

(Signed) SPENCER, FENNER, GIDIERE & PHELPS,
Attorneys for Western Union Telegraph Company, Defendant.

H. J. C. 2-18-20.

We agree to the foregoing, and, particularly, the sending up of the documents specified in the original. It is understood that the report of the Interstate Commerce Commission offered in evidence need not be included in the transcript but shall be noticed by the appellate Court.

(Signed) HALL, MONROE & LEMMANN,
Attorneys for Esteve Bros., Plaintiff.

55 UNITED STATES OF AMERICA,
District Court of the United States:

Clerk's Office.

I, Henry J. Carter, Clerk of the District Court of the United States for the Eastern District of Louisiana, do hereby certify that the foregoing 47 pages contain and form a full, complete, true and perfect transcript of the record, assignment of errors and proceedings in the case of "Esteve Brothers & Company, versus Western Union Telegraph Company," No. 15,830 of the Docket of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division (made in accordance with the præcipe for transcript, copied herein.)

Witness my hand, and the seal of the said Court, at the City of New Orleans, State of Louisiana, this 28th day of February, A. D. 1920.

[SEAL.] H. J. CARTER,
Clerk.

Writ of Error and Citation omitted from the printed record, being filed in the original.

* * * * * * *

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of April 7th, 1920.

No. 3506.

WESTERN UNION TELEGRAPH COMPANY

versus

ESTEVE BROTHERS & COMPANY.

On this day this cause was called, and, after argument by Rush Taggert, Esq., for plaintiff in error, and Monte M. Lemann, Esq., for defendant in error, was submitted to the Court.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3506.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,

versus

ESTEVE BROTHERS & COMPANY, Defendant in Error.

Error to the District Court of the United States for the Eastern District of Louisiana.

Rush Taggart and Esmond Phelps, (Spencer, Gidiere & Phelps, Rush Taggart, Francis Raymond Stark and Joseph Egan, on the brief), for Plaintiff in Error.
J. Blanc Monroe and Monte M. Lemann for Defendant in Error.

Before Walker, Circuit Judge, and Call and Hutcheson, District Judges.

WALKER, *Circuit Judge:*

This was an action by the defendants in error, (herein referred to as the plaintiffs), against the plaintiff in error, the Western Union Telegraph Company, (herein referred to as the defendant), for the alleged amount of the loss or damage occasioned to the former by the latter's negligent failure to transmit correctly a cable message addressed and sent on September 13, 1917, to the plaintiffs at New Orleans, Louisiana, by its representative at Barcelona, Spain, where the plaintiffs have their main office. The body of the message as sent read:

"Sell two hundred bales futures, naming equivalent New Orleans October price."

The body of the message as it was delivered by the defendant at New Orleans read:

"Sell two thousand bales futures naming equivalent New Orleans October price."

On the trial the following facts were admitted: The plaintiffs at Barcelona deposited the above mentioned message in the Central Office of the Telegraph Administration, which is owned and operated by the Spanish Government, for transmission to New Orleans. It was correctly transmitted by the Spanish Telegraph Administration to Paris, France, was correctly transmitted by the system of telegraphs owned and operated by the French Government from Paris to Havre, France, and was there delivered to the defendant, which transmitted it correctly by cable to New York City, and turned it over reading correctly to its land line system. An error occurred in the transmission of the message by the defendant from New York City to New Orleans, the word "thousand" being substituted for "hundred." The amount paid by plaintiffs to the Spanish Telegraph Administration at Barcelona for the transmission, in the above stated manner, of the message to its destination was $6.60, of which the defendant subsequently received $4.65 for transmitting it from Havre to New Orleans, of which $3.75 was apportioned to the transmission from Havre to New York and ninety cents to transmission from New York to New Orleans. Immediately upon receipt of the message as it read when delivered on the day it was sent the plaintiff's New Orleans office sold 2,000 bales of cotton for future delivery in January at 19.57 cents per pound, and on September 15th, 1917, advised its Barcelona office by cable sent over the defendant's lines that it had done so. Immediately upon receipt of that cable plaintiff's Barcelona office advised their New Orleans office by cable sent over the defendant's lines that the order was for 200 instead of 2,000 bales. Immediately upon receipt of the last mentioned cable plaintiff's New Orleans office bought 1,800 bales of cotton for future delivery in January at 23.01 cents per pound, resulting in a loss to the plaintiffs of $31,095, that being the aggregate of the difference between the price at which the plaintiffs sold 1,800 bales and the price at which it subsequently bought the same number of bales and the commissions paid. In the month of May, 1916, the defendant, acting through duly authorized representatives, filed with the Interstate Commerce Commission its classification of land line and cable messages and filing forms of such messages, together with the conditions under which the various classes of land line and cable messages are handled, and its tariffs and schedules, all which documents remained on file and unchanged at the time the message in question was sent. One of the classes of land line and cable messages so shown is unrepeated messages, as to which it was provided and shown on the filed forms that defendant was not liable for mistakes or delays in transmission or delivery or for non-delivery beyond the amount received for sending the same, the tariff rates for unrepeated messages being

less than such rates for repeated messages. The amount paid for sending the message in question was the rate called for by such filed tariff for an unrepeated message from Barcelona, Spain, to New Orleans, Louisiana. The plaintiffs did not request to have the message in question repeated. If they had so requested, they would have been required to pay a higher rate. It is not usual to ask that such messages be repeated. The plaintiffs had no actual information of the filing by the defendant with the Interstate Commerce Commission of any forms, blanks, tariffs or schedules. None of those forms or blanks were used at any time in the receiving or transmission of the message in question. The Interstate Commerce Commission has not adopted any rule or regulation requiring the filing of any tariffs, schedules, blanks, or forms of telegraph or cable companies.

Exceptions were reserved by the defendant to the action of the court in granting a motion of the plaintiffs to direct a verdict in their favor for the sum of $31,095.00, and in refusing a motion of the defendant that it direct a verdict in favor of the plaintiffs in the sum of $4.65, with interest at five per cent from September 13, 1917.

There was no evidence tending to prove that in any way the plaintiffs were made aware that the payment of more than was charged and paid for the transmission of the message was required to make the defendant liable to the plaintiffs for the loss or damage sustained by the latter in consequence of such a breach of duty as the one alleged and admitted. No evidence adduced would support a finding that the plaintiffs consented to the limitation of liability claimed by the defendant. What was disclosed was the tender and acceptance of the message for transmission unaccompanied by any stipulation or condition as to the liability thereby incurred. From the acceptance, in the manner disclosed, of the message for transmission and delivery it is not to be inferred that there was an understanding between the parties to the transaction that the service was undertaken on a condition limiting a carrier's liability for a default. The rate charged and paid was, unknown to the plaintiffs, less than the defendant's customary one for such a service when liability is not limited to the amount paid by the sender; but in no way did the plaintiffs assent to a limitation of the defendant's liability. The case is one of a carrier of messages according preferential treatment to a sender without the latter's knowledge or consent, and not one of a carrier stipulating for a limitation of liability for a negligent failure to transmit correctly. The rate charged and paid could not have signified a limitation of the carrier's liability to a sender who was not aware or notified of the condition on which that rate customarily was given. The defendant relies on provisions of the Interstate Commerce Commission Act, (8 Comp. St. An. §§8563 et seq.), to sustain the contention that, though the plaintiffs were unaware that the rate charged and paid for the transmission of the message was the filed tariff rate for an unrepeated message, and that according to that tariff a higher rate was required to be paid to make the defendant liable for more than the amount paid for the service, the plaintiffs are deprived of the right to recover more than that amount by provisions contained in documents on

file with the Interstate Commerce Commission, of the existence and contents of which the plaintiffs had no knowledge or notice. Section 1 of that Act, as amended June 18, 1910, provides that the provisions of the Act shall apply to telegraph, telephone and cable companies, (whether wire or wireless), engaged in sending messages from one State, Territory or District of the United States to any other State, Territory or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of the Act; and that section contains the following provision:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, That messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages."

Section 3 of the Act contains the following provision:

"It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice, or disadvantage in any respect whatsoever."

Amended section 15 of the Act empowers the Commission to determine and prescribe maximum rates for the transmission of messages by telegraph or telephone, and classifications, regulations or practices of companies subject to the Act and engaged in transmitting such messages. By amended section 20 of the Act the Commission is empowered to require annual reports from all common carriers subject to the provisions of the Act, and to prescribe forms of accounts required to be kept by such common carriers. At the time of the transaction in question the Commission had not, so far as telegraph, telephone, or cable companies are concerned, exercised any of the powers conferred on it by sections 15 and 20 of the Act. By their terms many of the provisions of the Act do not apply to telegraph, telephone, or cable companies. Among such inapplicable provisions are those requiring the adoption, filing and publication of rates for interstate or foreign transportation, and regulations in regard to such transportation, and prohibiting and penalizing departures by either carriers or shippers from rates or regulations so filed and published. The Act contains no requirement as to filing or publishing rates, classifications, rules or regu-

lations voluntarily adopted by telegraph, telephone, or cable companies.

The above quoted provision of Section 1 of the Act with reference to classification of messages by telegraph, telephone, or cable, and charging different rates for the different classes of messages, is a permissive, not a compulsory, one. It does not purport to give to the adoption and filing with the Commission of a classification by a carrier of such messages and of rates and regulations applicable to the different classes of messages the effect of binding a sender of a message by an adopted and filed regulation or provision of which the sender in no way is informed or notified. It does not purport to charge senders of messages with notice of classifications, rules, or regulations filed by the carrier with the Commission. It does not provide for a limitation of liability not contracted for by parties undertaking to transmit and deliver such messages. In the absence of a statutory or contractual modification of such liability the party in whose favor it is incurred, if there is a negligent failure to transmit the message correctly, is entitled to recover such damages as are the direct and natural result of that breach of duty, including special damages which the terms of the message disclose to be likely to result from such a default. Nothing in the last referred to provision affects the question of the extent of the carrier's liability for a negligent failure to transmit correctly a message tendered and accepted under circumstances furnishing no basis for the conclusion that the sender assented to any modification or limitation of the carrier's liability for such a default. The other provisions of the Act which must be relied on to support the contention made in behalf of the defendant are the above quoted ones of Sections 1 and 3 to the effect that charges for the transmission of messages by telegraph, telephone, or cable, or in connection therewith, shall be just and reasonable, unjust or unreasonable charges for such services being prohibited and declared to be unlawful; and that the giving of any undue or unreasonable preference or advantage, or the subjecting of any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever are prohibited. Obviously the legislative motive for the enactment of those provisions was to protect parties procuring the services of the carriers mentioned from exactions by such carriers of unjust or unreasonable charges for such services, and from being made the victims of undue or unreasonable discriminations against such parties and in favor of others having similar dealings with the carriers. It is not to be supposed that those provisions were intended to have the effect of enabling a carrier to escape liability for a breach of its undertaking to render a service in the line of the business in which it is engaged by showing that the party for whom that service was undertaken was, without the knowledge or fault of that party, charged less therefor than its reasonable value or than was exacted of others for similar services, or otherwise was accorded undue preferential treatment. The provisions were intended for the benefit of parties unjustly discriminated against, and were not intended to enable a

carrier to shield itself from the consequences of a breach of its obligation to a party who was an unconscious recipient of the carrier's preferential treatment. Before by amendment of the Act those provisions were made applicable to telegraph, telephone and cable companies, and before by amendment of the Act both interstate shippers and carriers of things and persons were required to conform to duly filed and published rates and regulations, the above quoted provisions of Sections 1 and 3 of the Act were in force and applicable to such carriers of persons and things. While the statute law was in the condition just indicated it did not, as to carriers then subject to its provisions, have such effect as is attributed to it in behalf of the defendant. In Merchants Cotton Press & S. Co., v. Insurance Company of North America, 151 U. S., 368, it was contended that the giving and acceptance of a rebate on a shipment of cotton rendered void the bills of lading issued by the carrier for the cotton, with the result that the carrier was not liable for the loss of the cotton. It was not shown that the consignees or owners knew of the rebate. In overruling that contention, the Court quoted with approval the following from the opinion of the court whose judgment was under review:

"We are of opinion, however, and rest our decision upon the ground that if it were assumed that the law was applicable, and the fact of agreement for rebate and special rate proven, it would not prevent liability on the part of the carrier for the freight received and covered by insurance in the hands of the carrier's agent. The law makes such agreements as to rebate, etc., void, but does not make the contract of affreightment otherwise void, and we think there is nothing in the law or the policy of it which requires a construction that would excuse a carrier from all liability where it made such a contract in connection with that for receipt and transportation of freight. Such a construction would encourage rather than discourage such unlawful agreements for rebates. The carrier might prefer them to liability for the freight. Such a contract for rebate would be void, and could not be enforced, but we think the shipper could nevertheless recover for loss of his freight through the carrier's and insurer's negligence."

In deciding that under the law as it now is an interstate carrier is not liable under a stipulation in a shipping contract for a special service not provided for in its filed and published tariffs, the court was careful to point out that the question of the carrier being under such liability for the goods accepted for carriage as it lawfully could subject itself to was not presented for decision. Chicago & Alton Ry. Co., v. Kirby, 225 U. S., 155, 166. It seems that the reasons supporting the conclusion reached in the case of Merchants Cotton Compress & S. Co. v. Insurance Co., supra, that the allowance of an unlawful rebate did not enable the carrier to escape liability for the goods undertaken to be carried also would support the conclusion that the fact that there was an unlawful discrimination in favor of a sender of a telegraph or cable message would not enable the carrier of such message to escape liability for a negligent failure

properly to transmit it, where the discrimination in favor of the sender was without his knowledge or consent. The ground on which courts refuse to enforce contracts made in contravention of such statutes as those above mentioned is that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction. Gibbs & Sterrett Mfg. Co. v. Brucker, 111 U. S., 597. That ground does not exist where the sender of a message, not by law chargeable with knowledge of the rate payable for the service he contracts for, unwittingly pays less than that rate for such service. The opinion in the case of Mobile & Ohio R. R. Co. v. Dismukes, 91 Ala., 131, well illustrates how such provisions as the above quoted ones of the Interstate Commerce Commission Act would be perverted from the purpose of their enactment by giving them the effect attributed to them in behalf of the defendant. It may be supposed that not infrequently an applicant for telegraphic or cable service would find conveniently at hand blank paper on which to write his message and would be charged the unrepeated message rate, without anything being said about a limitation of the carrier's liability, if the adoption of that method of dealing could result in the carrier's liability for a negligent failure to transmit correctly being limited to the amount paid by the sender. The injustice of such a result is obvious where neither the law nor the party contracting to render service makes adequate provision for notice to the party to be served of conditions on which the service is undertaken.

Under the Interstate Commerce Commission Act as it is now in force an interstate shipper is chargeable with notice of duly filed and published rates and conditions subject to which shipments at those rates are allowed, with the result that such a shipper is bound by a limitation of liability shown by the carrier's filed and duly published tariffs to be an incident of the rate charged. Boston & Maine R. R. Co. v. Hooker, 233 U. S., 97. But such a shipper was not forbidden to depart from rates or regulations adopted by a carrier, and subjected to penalties for so doing, until the law afforded him adequate means of ascertaining what those rates and regulations are, without having to depend upon such information in regard thereto as the carrier might choose to impart. The Act, as it was in force at the time of the transaction in question, did not require senders of interstate or foreign telegraph or cable messages to conform at their peril to rates or regulations adopted by carriers of such messages; and, in the absence of authorized action on the subject by the Commission, provided no means for the senders of such messages acquiring authentic information as to rates, classifications, or regulations adopted by such carriers. The senders of such messages have not been brought under the provisions of the Act as amended which bind an interstate shipper of goods to conform to duly filed and published rates and conditions applicable to his shipment, whether the shipper does or does not know of or assent to such rate and conditions. No provision of the Act purports to put it in the power of a carrier of messages by telegraph or cable to bind senders thereof by conditions not brought to the notice of the latter. Noth-

ing in the Act manifests an intention to deprive a sender of such a message, who is the unconscious and innocent recipient of forbidden preferential treatment at the hands of the carrier, of the right to enforce the liability incurred by the latter by a breach of its undertaking. In view of the facts just mentioned we are of opinion that nothing contained in the Act justifies the imputation to the law makers of the intention to give to the adoption by a carrier by telegraph or cable of interstate or foreign messages of rates, classifications, regulations, etc., and the filing thereof with the Commission, the effect of charging senders of such messages with notice of rates, classifications, regulations, etc., so adopted and filed, and of prohibiting and penalizing departures therefrom by such senders who actually and without fault on their part are uninformed in regard thereto. Assuming, without admitting, that the contract which resulted from the acceptance in Europe of the message in question for transmission and delivery could not be enforced by the senders if the Act would not permit the enforcement of such a contract made in this country, we are of opinion that nothing in that Act properly can be given the effect of enabling the defendant to limit its liability for the default alleged and admitted to the amount charged the plaintiffs for the service and paid by them without knowledge or notice that it was less than the amount customarily paid for such a service when no limitation of liability is stipulated for.

The question as to whether the defendant had a valid claim against the plaintiffs for the amount of the difference between what was paid and what is payable for the service when no limitation of the defendant's liability is stipulated for was not in any way raised. It is not contended that the plaintiffs were not damaged, as a proximate result of the default alleged and admitted, in the amount for which a verdict in their favor was directed; nor is it contended that the terms of the message failed to indicate that such damages might result from such a default.

The conclusion is that the court did not err in giving the instruction requested by the plaintiffs. The judgment on the verdict rendered in pursuance of that instruction is

Affirmed.

(Original filed May 26th, 1920.)

Judgment.

Extract from the Minutes of May 26th, 1920.

No. 3506.

WESTERN UNION TELEGRAPH COMPANY

versus

ESTEVE BROTHERS & COMPANY.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered and adjudged that the plaintiff in error, Western Union Telegraph Company, and the surety on the writ of error bond herein, American Surety Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 56 to 70 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 3506, wherein Western Union Telegraph Company is plaintiff in error, and Esteve Brothers & Company is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 55 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 16th day of July, A. D. 1920.

[Seal of United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

72 In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3506.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,

versus

ESTEVE BROTHERS & COMPANY, Defendant in Error.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the annexed writ of certiorari, I now hereby certify that on the 3rd day of November, A. D., 1920, there was filed in my office a stipulation in the above entitled cause, in the following words, to wit:

"United States Circuit Court of Appeals, Fifth Circuit.

No. 3506.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,

vs.

ESTEVE BROTHERS & COMPANY, Defendant in Error.

It is hereby stipulated and agreed, between Messrs. Hall, Monroe & Lemann, Attorneys for Esteve Brothers & Company, Defendant in Error, and Messrs. Spencer, Fenner, Gidiere & Phelps, Attorneys for Western Union Telegraph Company, Plaintiff in Error, that the transcript of the record certified by the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit and filed with the Clerk of the Supreme Court of the United States in connection with the application to said Court by the Western Union Telegraph Company for a writ of certiorari shall be taken as a return to the writ of certiorari issued by the Supreme Court of the United States, in the case entitled: "Western Union Telegraph Company, Petitioner, vs. Esteve Brothers & Company," No. 491, October Term, 1920,

73 of said Court.

(Signed) HALL, MONROE & LEMANN,
MONTE M. LEMANN,
Attorneys for Esteve Brothers & Company, Defendant in Error.

(Signed) SPENCER, FENNER, GIDIERE & PHELPS,
ESMOND PHELPS,
Attorneys for Western Union Telegraph Company, Plaintiff in Error."

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 3rd day of November, A. D. 1920.

[Seal of the United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.
By GEO. W. ROBERTSON,
Deputy Clerk.

74 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Western Union Telegraph Company is plaintiff in error, and Esteve Brothers & Company is defendant in error, No. 3506, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of Louisiana, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do
75 hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-second day of October, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

76 [Endorsed:] File No. 27,848. Supreme Court of the United States, October Term, 1920. No. 491. Western Union Telegraph Company vs. Esteve Brothers & Company. Writ of certiorari. U. S. Circuit Court of Appeals. Filed Nov. 3, 1920. Frank H. Mortimer, clerk.

77 [Endorsed:] 491—27848. No. 3506. United States Circuit Court of Appeals for the Fifth Circuit. Western Union Telegraph Company, plaintiff in error, vs. Esteve Brothers & Company, defendant in error. Writ of certiorari and return thereto.

78 [Endorsed:] File No. 27,848. Supreme Court U. S. October Term, 1920. Term No. 491. Western Union Telegraph Co., pl'ff in error, vs. Esteve Brothers & Company. Writ of certiorari and return. Filed Nov. 6, 1920.